TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~802~~ 107

THE PHŒNIX INSURANCE COMPANY, PLAINTIFF IN ERROR,

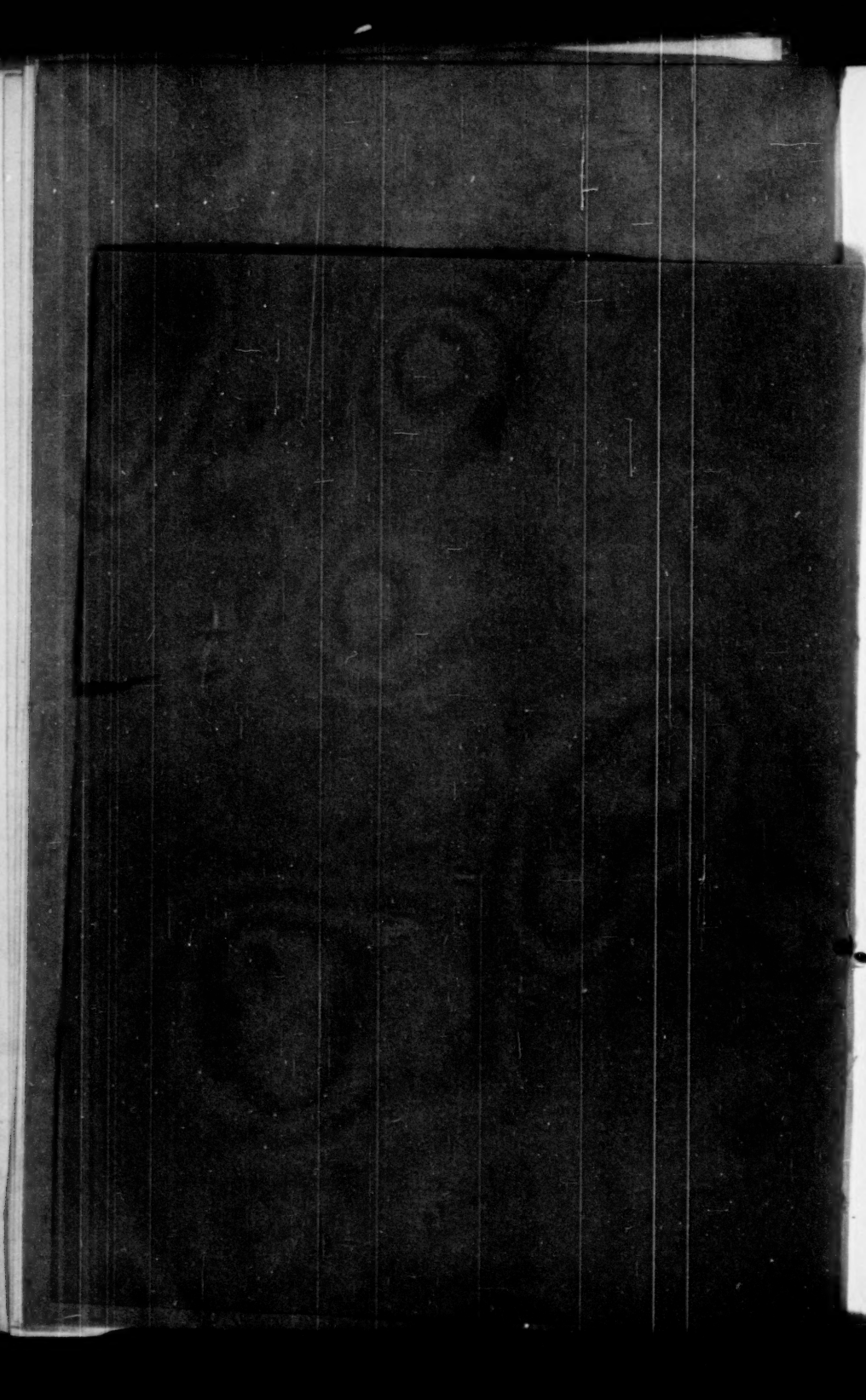
vs.

THOMAS A. GARDINER, COUNTY TREASURER OF KINGS COUNTY.

REMITTITUR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED DECEMBER 4, 1869.



7.

SUPREME COURT OF THE UNITED STATES.

No. 302.

THE PHŒNIX INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS A. GARDINER, COUNTY TREASURER OF KINGS COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Return	1	1
Writ of error	2	1
Assignment of error	4	2
Bond	7	2
Citation and service	9	3
Writ of alternative mandamus	11	4
Return to writ of alternative mandamus	14	6
Demurrer	15	6
Decree	16	7
Opinion	18	7
Final decree of supreme court, New York	23	10
Appeal to court of appeals	25	11
Decree of court of appeals	27	12

1 The answer of the justices of the supreme court of the State of New York, in the within writ named, doth certify, under the seal of our said court, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, and send the record whereof mention in said writ is made, with all things touching or in any wise concerning the same, as appears in a certain schedule to this writ annexed, as within it is commanded.

[SEAL.] JOHN J. WHITE, *Clk.*

2 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the justices of the supreme court of the State of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, before you or some of you, having thereto been remitted by the court of appeals of said State, after the decision rendered by the said court of appeals, by the judges thereof, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Phœnix Insurance Company, plaintiff and appellant, and Thomas A. Gardiner, county treasurer of Kings County, defendant and respondent, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution or laws of the
3 United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Phœnix Insurance Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-eight.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

S. NELSON.

NOV. 16, '69.

(Indorsed:) U.S. Supreme Court. Phœnix Insurance Company, ag'st Thomas A. Gardiner, co. treasurer of Kings Co. Writ of error. R. D. Benedict, plaintiff's attorney.

4 Supreme Court of the United States.

THE PHŒNIX INSURANCE COMPANY *against* THOMAS A. GARDINER, COUNTY treasurer of Kings County. } In error.

Of December term, in the year of our Lord one thousand eight hundred and sixty-eight.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Phœnix Insurance Company, by R. D. Benedict, its attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said Thomas A. Gardiner, county treasurer of Kings County against the said Phœnix Insurance Company; whereas, by the law of the land, the said judgment ought to have been given for the said Phœnix Insurance Company, against the said Thomas A. Gardiner, county treasurer of Kings County; and the said Phœnix Insurance Company prays that the judgment aforesaid may be reversed,
5 annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of the said judgment.

R. D. BENEDICT,
Attorney for Plaintiff in Error.

6 (Indorsed:) U. S. Supreme Court. Phœnix Insurance Co. ag'st Thomas A. Gardiner, co. treasurer Kings Co. Assignment in error.

7 Know all men by these presents that we, Stephen Crowell, of the city of Brooklyn, county of Kings, & State of New York, and Alvin C. Bradley, of Middletown, county of Richmond, & State of New York aforesaid, are held and firmly bound unto Thomas A. Gardiner, county treasurer of Kings County, in the sum of five hundred ($500) dollars, to be paid to the said Thomas A. Gardiner, his successor in office, executors, or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, & each of our, heirs, executors, & adm'rs, firmly by these presents, sealed with our seals, and dated this eleventh day of November, in the year of our Lord one thousand eight hundred and sixty-nine:

Whereas the Phenix Insurance Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of affirmance rendered by the court of appeals of the State of New York, (being the highest court of law or equity in such State in which judgment could be rendered,) in a suit wherein the said Phœnix Insurance Company was plaintiff and appellant, and Thomas A. Gardiner, county treasurer of Kings County, defendant and respondent, the record and pleadings in which cause have been remitted from said court of appeals to the supreme court of said State, in the county of Kings, wherein the same now remains of record:

Now, therefore, the condition of this obligation is such, that if the above-named Phenix Insurance Company shall prosecute its said writ of error to effect, and answer all costs, if it shall fail to make good its plea,

then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(S'g'd) STEPHEN CROWELL. [L. S.]
(S'g'd) ALVIN C. BRADLEY. [L. S.]

Sealed and delivered in presence of—
(S'g'd) HENRY L. NELSON.

Approved by—

S. NELSON.

Nov. 16, '69.

8 On this eleventh day of November, 1869, before me, Henry L. Nelson, a notary public in and for the county of Kings, personally appeared Stephen Crowel and Alvin C. Bradley, to me known to be the persons described in and who executed the foregoing bond, and the said Stephen Crowel and Alvin C. Bradley severally and personally acknowledged that they executed the same.

And the said Stephen Crowel, of the city of Brooklyn, county of Kings, and State of New York, and Alvin C. Bradley, of Middletown, county of Richmond, and State of New York aforesaid, being duly severally sworn, say, each for himself, that he is a householder, worth double the amount of the foregoing bond, exclusive of the property exempt from execution, and over and above all demands and liabilities.

[L. S.] HENRY L. NELSON,
Notary Public for Kings Co., State of New York.

9 The United States of America to Thomas A. Gardiner, county treasurer of Kings County, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of New York, wherein the Phœnix Insurance Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Nelson, associate justice of the Supreme Court of the United States, this sixteenth day of November, in the year of our Lord one thousand eight hundred and sixty-nine.

S. NELSON.

10 On this 22nd day of November, in the year of our Lord one thousand eight hundred and sixty-nine, personally appeared Henry L. Nelson before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Phillip S. Crooke, the attorney for Thomas A. Gardiner, county treasurer of Kings County, defendant in error herein, at the same time showing him the original.

HENRY L. NELSON.

Sworn to and subscribed the 22nd day of November, A. D. 1869.

CHA'S W. NEWTON,
United States Commissioner for the Southern District of New York.

11 Supreme court.

Pleas at the court-house in the city of Brooklyn and county of Kings, at the January special term, in the year 1867.

KINGS COUNTY, *ss:*

Be it remembered that, at the special term of the said court, held on the 17th day of November, 1866, before the Honorable Jasper W. Gilbert, one of the justices of the supreme court of the State of New York, the said people, on the relation of the Phenix Insurance Company, issued their writ of alternative mandamus to Thomas A. Gardiner, esquire, then being county treasurer of the said county of Kings; which writ is in the words and figures following:

The people of the State of New York to Thomas A. Gardiner as county treasurer of the county of Kings, greeting:

Whereas heretofore, to wit, on the eighth day of December, in the year one thousand eight hundred and sixty-three, the Phenix Insurance Company, being then, and ever since, an incorporated company in the county of Kings, paid the said county of Kings the sum of twelve hundred and forty-one 57-100 dollars for taxes illegally assessed, imposed, and collected on the investments of the said company in the public indebtedness of the United States; that is to say, in stocks, bonds, and other securities of the United States, commonly called "seven-thirties," to the amount of five thousand and fifty dollars; "five-twenties," to the amount of ten thousand dollars; "bonds of 1867," to the amount of eighteen thousand dollars; "bonds of 1865," to the amount of nine thousand dollars; and "certificates of indebtedness," to the amount of thirty thousand dollars.

And whereas, of the said sum of twelve hundred and forty-one 57-100 dollars, the sum of four hundred and seventy-two 93-100 dollars was the portion so illegally assessed, imposed, and collected on the invest-
12 ments of said company in the said "certificates of indebtedness," to the amount of thirty thousand dollars.

And whereas afterwards, and on the twenty-second day of November, in the year one thousand eight hundred and sixty-four, the said Phenix Insurance Company paid the county of Kings the further sum of nine thousand one hundred and ninety-five dollars for other taxes illegally assessed, imposed, and collected on investments of the said company in the public indebtedness of the United States; that is to say, in stock, bonds, and other securities of the United States; commonly called "five-twenties," to the amount of sixty-five thousand dollars; "bonds of 1881," to the amount of fifty-five thousand dollars; "bonds of 1867," to the amount of eighteen thousand dollars; "ten-forties," to the amount of seventy-five thousand dollars; and "certificates of indebtedness," to the amount of eighty-two thousand dollars.

And whereas, of the said sum of nine thousand one hundred and ninety-five dollars, the sum of twenty-five hundred and fifty 90-100 dollars was the portion so illegally assessed, imposed, and collected on the investments of said company in the said "certificates of indebtedness" to the amount of eighty-two thousand dollars.

And whereas you, as such county treasurer, did, before the 12th day of May last past, receive a certified copy of an act entitled "An act to authorize the board of supervisors of the county of Kings to correct illegal assessments for town, county, and State taxes," passed April 6th, 1866, by which act it was made your duty as such county treasurer,

on receiving a certified copy of the passage of the said act, to issue to the said Phenix Insurance Company one or more certificates of indebtedness, payable on or before February first, eighteen hundred and sixty-seven, with interest thereon from the time said taxes were illegally paid, for the sum illegally assessed on the investments of the said company in the public indebtedness of the United States.

Nevertheless, although on the 12th day of May last past, the said Phenix Insurance Company did in due form demand of you as such county treasurer, such certificate of indebtedness as aforesaid, for
13 the amounts so by them illegally paid, with interest thereon; and although you, as such county treasurer, did afterwards issue to the said Phenix Insurance Company a certificate for the sum of seven thousand four hundred and twelve 74-100 dollars, bearing interest from the first day of May last, being the sum illegally paid by the said company for assessments on its investments in the public indebtedness of the United States other than "certificates of indebtedness" hereinbefore mentioned, and did pay to the said Phenix Insurance Company the sum of seven hundred and thirty-nine 66-100 dollars, as and for interest on the said sum of seven thousand four hundred and twelve 74-100 dollars from the time the same was illegally paid to the first day of May last; yet you, so being such county treasurer, although thereunto specially requested, did and still do refuse, wrongfully and unjustly, as is alleged, to issue to the said company any certificate whatever for, or which shall include the amount of taxes, or any part thereof, illegally assessed, imposed, or collected, as aforesaid, on the investments of the said company in that part of the public indebtedness of the United States called "certificates of indebtedness" hereinbefore mentioned, or any interest on such taxes from the time the same were illegally paid.

And although it has been judicially decided that all taxes assessed, imposed, and collected on investments in the public indebtedness of the United States were illegal, yet such your refusal before mentioned is based on the sole alleged ground that assessments on investments by the said Phenix Insurance Company in the public indebtedness of the United States, evidenced by "certificates of indebtedness," are not within the purview of the act hereinbefore mentioned, and that, by consequence, you, as such county treasurer as aforesaid, had and have no authority in law to issue the certificates so as aforesaid refused to the said Phenix Insurance Company.

Now, therefore, we, being willing that full and speedy justice be done in this behalf to the said Phenix Insurance Company, do therefore command you, as such county treasurer as aforesaid, that, immediately
14 after the receipt of this writ, you, as such county treasurer as aforesaid, issue to the said Phenix Insurance Company one or more certificates of indebtedness, payable on or before the first day of February next, for the taxes illegally imposed, assessed, and collected as aforesaid from the said Phenix Insurance Company on their investments in the public indebtedness of the United States, evidenced by "certificates of indebtedness," as hereinbefore mentioned, with interest thereon from the time the said taxes were illegally paid, or that you, as such county treasurer, show cause to the contrary thereof before our supreme court, at the next special term, to be held at the court-house in the city of Brooklyn on the first Monday of December next, lest complaint shall again come to us by your default, and in what manner you shall have executed this our writ make known to our supreme court at the next special term thereof, to be held at the time and place afore-

said. Witness Hon. Jasper W. Gilbert, justice of the supreme court, at the city of Brooklyn, the seventeenth day of November, 1866.

(Signed) JOHN J. WHITE, *Clerk.*

A. C. BRADLEY,
Att'y for Relator, 74 Wall Street, New York.

And the said defendant returns to the said writ as follows:

The answer of Thomas A. Gardiner, treasurer of Kings County, to the Phenix Insurance Company.

I, the said Thomas A. Gardiner, county treasurer of Kings County, for answer to the alternative writ of mandamus heretofore issued against me, on the relation of the Phenix Insurance Company, say that the taxes on "certificates of indebtedness" mentioned in said writ of alternative mandamus are not decided, and have not been judicially decided to have been illegally imposed or collected, nor has it been judi-
15 cially decided that "certificates of indebtedness" of the United States of America are exempt from taxation, and that taxes thereon have been illegally imposed and collected; and therefore that the investments of the relator in "certificates of indebtedness" stated in said mandamus are not within the purview of the act—chap. 418, of the laws of 1866—and therefore I, the said Thomas A. Gardiner, county treasurer of Kings County, had and have no authority in law to issue the certificates so as aforesaid refused to the Phenix Insurance Company, as by that writ we were within commanded.

December 3d, 1866.

THOMAS A. GARDINER,
County Treasurer.

And the said relator, by Alvin C. Bradley, its attorney, demurs to the said relator as follows:

Supreme court.

THE PEOPLE OF THE STATE OF NEW YORK, on the relation of the Phenix Insurance Co., *ag'st* THOMAS A. GARDINER, COUNTY TREASURER.

The relator demurs to the return of the defendant, for that the same does not state facts sufficient to constitute a defense to the said writ.

A. C. BRADLEY,
Attorney for Relator.

In which demurrer the said defendant, by Philip S. Crooke, his attorney, joins as follows:

16 Supreme court, Kings County.

THE PEOPLE EX REL. THE PHENIX INSURance Co. *against* THOMAS A. GARDINER, COUNTY TREASURER.

The said Thomas A. Gardiner, county treasurer of Kings County, says that the matters stated by him in his said return to the writ of al-

ternative mandamus herein are sufficient in law in answer thereto for not doing as therein directed, and he is ready to verify and prove the same, as the said court shall direct. Wherefore, inasmuch as the said relator has not denied or answered the same, the said Thomas A. Gardiner, county treasurer, prays judgment with costs.

PHILIP S. CROOKE,
Respondent's Attorney.

And now, at this same January term, in the year 1867, at the city of Brooklyn aforesaid, came the parties aforesaid, by their attorneys aforesaid, and the matters aforesaid, and the parties aforesaid, by their counsel, being duly heard and due deliberation had thereupon, it is ordered, adjudged, and decided by the Hon. Jasper W. Gilbert, justice of this court, before whom the same was argued, that the respondent therein, the said Thomas A. Gardiner, county treasurer, have judgement against the relator herein, and with costs to be taxed.

Wherefore it is considered that the said Thomas A. Gardiner, county treasurer, respondent herein, have judgment against the relator, the people on the relation of the Phenix Insurance Company herein,
17 and that the demurrer to the return be overruled; and that the respondent have judgment against the said relator for his costs as taxed, amounting to sixty-eight dollars and ninety-nine cents.

Judgment signed this first day of February, A. D. 1867.

J. W. GILBERT.
JOHN. J. WHITE.

Supreme court.

THE PEOPLE ON THE RELATION OF THE PHENIX Fire Insurance Company, pl'ffs and appellants,
against
THOMAS A. GARDINER, COUNTY TREASURER, def't and resp't.

To P. S. Crooke, esq., respondent's attorney, John J. White, esq., clerk of the county of Kings.

SIRS: You will please take notice that the plaintiffs appeal to the general term of this court from the judgment, and every part thereof, entered in this action in favor of the defendant and against the plaintiffs, on the first day of February, 1867.

Dated Feb. 2d, 1867.

Yours, &c.,

ALVIN C. BRADLEY,
App'll'ts' Att'y, 74 Wall St., N. Y.

18 *Opinion of court at special term.*

Supreme court.

THE PEOPLE EX REL. THE PHENIX INSURance Co.
ag'st
THOMAS A. GARDINER, COUNTY TREASURER.

Gilbert, J.

The relator is a corporation, doing business in the city of Brooklyn, and was assessed for the taxes of 1863 and 1864 upon its investments

in the certificates of indebtedness issued pursuant to the acts of Congress passed in 1862. (12 Stat. at Large, 352, 370.)

These taxes were paid into the county treasurer's office of Kings County. On the 6th of April, 1866, the legislature of this State passed an act entitled "An act to authorize the board of supervisors of the county of Kings to correct illegal assessments for town, county, and State taxes," and thereby authorized and directed the supervisors of said county "to levy and collect by tax the several sums paid the county of Kings by the several incorporated companies in said county in 1863 and 1864 for taxes assessed on their investments in the public indebtedness of the United States, with interest thereon, and which taxes have been
19 judicially decided to have been illegally imposed and collected."

It then directed the county treasurer "to pay over and refund to the said corporations the several amounts of taxes thus illegally imposed and collected as aforesaid" out of the monies so to be raised, and in the mean time to issue certificates of indebtedness payable on or before January the 1st, 1867. The respondent having refused, after due demand, to issue to the relator the certificates for the sums paid by it as aforesaid, an alternative writ of mandamus was issued, commanding him so to do, or show cause, &c.

The return to this writ sets forth that the taxes against the relator aforesaid are not and have not been decided to have been illegally imposed or collected, nor has it been judicially decided that certifiates of indebtedness of the United States are exempt from taxation, and that taxes thereon have been illegally imposed and collected, and that the investments of the relator are not within the provisions of the act of April 6th, 1866, and therefore the respondent has no authority to comply with the relator's demand.

To this return the relator demurred. It is contended on the part of the respondent that the return presents a material issue of fact, namely, whether it has been judicially decided that the taxes in question were illegally imposed, &c., and that since the demurrer admits the truth of the facts stated in the return, the respondent is entitled to judgment.

This position of the respondent can be maintained only upon the assumption that the act of April 6th, 1866, limits the authority of the respondent to the issuing of certificates for taxes on investments which have been judicialy decided to be exempt.

I am of the opinion that no such limitation is contained in the act. The statute is a remedial one. Its object is shown by its title to have been redress for illegal taxation.

If the legislature meant the refunding only of such taxes as had been "judicially decided" to have been illegally imposed, to the supervisors, and not to the respondent, was committed the duty of determining what taxes came within the act.

20 The duty imposed on the respondent was ministerial merely, not judicial. The legal intendment is, that the supervisors performed their duty under the act, and there not being any averment to the contrary, it will also be intended that their action furnishes no defense to the respondent. The demurrer, therefore, is well taken.

It does not follow, however, that a peremptory mandamus must issue; for the question now arises whether the facts stated in the writ are sufficient. (People v. Ransom, 2 Comst., 490.)

Upon this subject the first question is, whether these certificates of indebtedness fall within the exemption contained in the act of Congress of February 26th, 1862. That exemption extends to all "stocks, bonds, and securities of the United States."

Manifestly they are not "stocks" or "bonds." Are they securities within the meaning of the act of Congress? Upon reflection, and contrary to my first impression, I have come to the conclusion that they are not.

They are authorized to be given only for two purposes, namely, "in satisfaction of audited and settled demands," "and in discharge of checks drawn by disbursing officers." They are, therefore, merely certificates or acknowledgments of a pre-existing indebtedness, incurred in the ordinary way, without any security or any specific pledge of the public faith. The object of granting the authority to issue them was to accommodate persons who had outstanding accounts against the government, by giving them tangible and certain evidence that such accounts had been audited and settled and of the amount due.

The government derived no benefit from them, except relief from demands for present payment, and an augmentation of the ability to furnish it further aid, which these facilities to the public creditors afforded, nor was the issue of them necessary to the enjoyment and exercise of the powers vested in the government. I think, therefore, they are not securities in any higher degree than the audited accounts and checks which they represent. The object of the exemption under con-
21 sideration has been generally understood to have been the facilitating the government in obtaining new and further credit upon loans of money and purchases of property.

If this was the object and intent of the statute, we are precluded by long and familiar rules of construction from extending the meaning of the word beyond what is necessary to promote and secure that object. (1 Bl. Com., 60; Trust Co. vs. Brady, 20 Barb., 119; Strong vs. Wheaton, 38 id., 124.)

It is also a significant fact that Congress had granted no authority to issue these certificates when the act containing the exemption was passed. They could not, therefore, have been in contemplation of Congress.

Perhaps the best legal test of the meaning of the word "securities" in this connection is in the application of the maxim, "Noscitur a sociis."

The statute exempts "stocks, bonds, and other securities of the United States." Stocks are the registered obligations representing a portion of the permanent funded debt of the government. Bonds are similar unregistered obligations, and upon the principle referred to the securities must be deemed the other obligations, of a less formal character, but created for the same general purposes, and having the same general uses. (Broom Leg. Max., 450 et seq.)

The learned counsel for the relator insisted that these certificates, being a form of government debt, were not taxable under State authority, even though they are not exempt from such taxation by act of Congress.

No adjudication to this extent, however, was cited. In the cases of McCullough vs. Maryland, (4 Wheat., 316,) and Osborn vs. The Bank of the United States, (9 id., 738,) the court decided no more than that the States could not tax the operations of The Bank of the United States, because that corporation was one of the means employed for carrying into execution powers vested in the general government. They ruled distinctly, in the first case, that property acquired by the bank in a State was liable to taxation.

In Weston vs. Charleston, (2 Pet.,) the court decided that State
22 taxation on government stock was illegal because it was a tax on

the contract, a tax on the power to borrow money on the credit of the United States. (See 2 Black, 631 et seq.)

These cases ought, on grounds of public policy, to be restricted to the point decided.

The exemption of the stocks and bonds of the United States is already severely felt by the people in the unequal burdens which those who are not owners of such property sustain.

A construction of the Constitution which establishes a privileged class of public creditors, who, though living under the protection of the government, are exempted from bearing their share of its burdens, ought to be very palpable before it is adopted.

The power of taxation under our government, as a general rule, is a concurrent one. The qualification of the rule as held by the Supreme Court of the United States in Van Allen vs. the Assessors, (3 Wallace, 585,) are the exclusion of the States from the taxation of the means and instruments employed in the exercise of the functions of the federal government.

It was also held in this case that when the concurrent power exists, although Congress may, by reason of its paramount authority, exclude the States, yet there is no doubt Congress may withhold the exercise of the authority, and leave the States free to act. If I am right in my construction of the act of Congress exempting "securities" from taxation, they have not excluded the States from the power to tax these certificates.

Consequently the mandamus must be denied.

23 At a general term of the supreme court, held at the court-house in the city of Brooklyn, in the second judicial district, on the fifteenth day of February, 1867.

Present, Justices John A. Lott, Joseph F. Barnard, and Jasper W. Gilbert.

THE PEOPLE EX REL. PHŒNIX INSURANCE Company
against
THOMAS A. GARDINER, COUNTY TREASURER.

Judgment affirmed, with costs. Opinion by Justice Barnard. Case argued before and decided by Justice Lott, Barnard, and Scuyham.

JOHN J. WHITE, *Clk.*

Supreme court.

THE PEOPLE EX REL. THE PHŒNIX INSURANCE Company, appellant,
against
THOMAS A. GARDINER, COUNTY TREASURER, respondent.

24 The appeal from the judgement entered in this cause with the clerk of Kings County, on the first day of February, A. D. 1867, coming on to be heard in its regular order on the calendar, at a general term of the supreme court, held at the court-house, Brooklyn, on the 15th day of February, 1867, after hearing Mr. Bradley, of counsel for appellant, and Mr. Crooke, of counsel for respondent, and due delibera-

tion being thereon had, it was adjudged by said court that said judgement be in all things affirmed, with costs. Now, on filing the decision of said general term in writing, and on motion of Philip S. Crooke, attorney for respondent, it is adjudged that said judgement be, and the same is hereby, in all things affirmed; and, on like motion, it is further adjudged that the said respondent, Thomas A. Gardiner, recover of and from the relator, appellant, The Phœnix Insurance Company, the sum of one hundred and two $\frac{21}{100}$ dollars, costs and disbursements of said appeal.

JOHN J. WHITE, *Clk.*

Judgment signed Feb'y 27, 1867.

J. W. GILBERT.

Supreme court.

THE PEOPLE OF THE STATE OF NEW YORK on the relation of the Phenix Insurance Company, plaintiffs and appellants,
25 *against*
THOMAS A. GARDINER, COUNTY TREASURER, &c., defendant & respondent.

To P. S. Crooke, esq., respondent's att'y, John J. White, esq., clerk of the county of Kings:

SIR: You will please to take notice that the plaintiffs appeal to the court of appeals from the judgement entered in this cause the 27th day of February, 1867, in favor of the defendant and against the plaintiffs, on the order of the general term, affirming, with costs, the judgement at special term, and from every part of such judgement.

Yours, &c.,

ALVIN C. BRADLEY,
Att'y for Appellants.

STATE OF NEW YORK, *County of Kings, ss:*

I, John J. White, clerk of the county of Kings, do hereby certify that I have compared the foregoing with the original judgment roll and notice of appeal on file in my office, and that the same are true transcripts thereof and of the whole of such originals.

In testimony whereof I have hereunto set my hand and affixed the seal of said county this 1st day of March, 1867.

[L. S.] JOHN J. WHITE, *Clk.*

26 In the court of appeals.

THE PEOPLE ON THE RELATION OF THE PHENIX Insurance Company, appellants,
against
THOMAS A. GARDINER, COUNTY TREASURER, respondent.

CITY & COUNTY OF NEW YORK, *ss:*

Alvin C. Bradley, being sworn, deposes and says that he this morning received from Mr. Justice Barnard a letter, undated, but postmarked yesterday, stating that the preparation of the opinion in this case had been delayed by the express company having miscarried his papers, and concluding as follows:

"I will prepare the opinion as soon as I can get time, and send you a copy.

"Very truly yours,

"J. F. BARNARD."

Further deponent saith not.

A. C. BRADLEY.

Subscribed and sworn this 5th day of March, 1867, before me.

FRANCIS T. JOHNSON,
Notary Public.

27 STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 31st day of December, in the year of our Lord one thousand eight hundred and sixty-seven, before the judges of said court.

Witness the Hon. Henry E. Davies, chief judge, presiding.

[L. S.] P. H. JONES, *Clerk.*

THE PEOPLE EX REL. THE PHŒNIX INSURANCE Co., appellant, *v.* THOMAS A. GARDINER, COUNTY TREASURER, &c., respond't. } Remittitur, April 13th, 1868.

Be it remembered that on the 6th day of March, in the year of our Lord one thousand eight hundred and sixty-seven, the people, &c., ex rel. the Phœnix Insurance Co., the appellant in this action, came here into the court of appeals, by Mr. A. C. Bradley, their attorney, and filed in the said court a notice of appeal & return thereto, from a judgement of the supreme court; and Thomas A. Gardiner, county treasurer, &c., the respondent in said action, afterwards appeared in said court
28 of appeals, by Mr. P. S. Crooke, his attorney, which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, this cause having been argued by Mr. A. C. Bradley, of counsel for the appellant, and after due deliberation had thereon, did order and adjudge that the judgement of the supreme court, appealed from in this action, be in all things affirmed; and it was further ordered and adjudged that the respondent recover against the appellant his costs of appeal to this court; and it was also further ordered that the record aforesaid, and the proceedings in this court, be remitted to the said court, there to be proceeded upon according to law.

Therefore it is considered that the said judgement be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon as well the notice of appeal and return thereto aforesaid as the judgement of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof,
29 according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said court, before the justices thereof, &c.

C. H. YOUNG,
Deputy Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, April 13, 1868.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action, in the court of appeals, with the papers originally filed therein attached thereto.

C. H. YOUNG,
Deputy Clerk.

30 Supreme court, Kings Co.

THE PEOPLE EX REL. THE PHŒNIX INSURANCE Co., appellant,
vs.
THOMAS A. GARDINER, COUNTY TREASURER, &c., respondent.

At a special term of the supreme court, held at the court-house in Brooklyn, on the 4th day of November, 1868.

Present, Hon. J. W. Gilbert, justice.

On reading and filing remittitur of court of appeals, whereby said judgement is affirmed with costs.

On motion of Philip S. Crooke, attorney for respondent,

Ordered, That the said judgement stand as the judgement of this court, and that the respondent recover his costs of the appellant.

Enter, J. W. G.

Granted, November 4, 1868.

J. J. WHITE, *Clk.*

31 Supreme court, Kings Co.

THE PEOPLE OF THE STATE OF NEW YORK, ON THE relation of the Phenix Insurance Company, appellants,
against
THOMAS A. GARDINER, COUNTY TREASURER of Kings County, respondent.
Judgement Nov. 4, 1868.

The judgement of this court having been affirmed by the court of appeals with costs, and the remittitur having been filed and made the judgement of this court by order duly entered,

On motion of Philip S. Crooke, attorney for respondents,

Adjudged, That the said judgement be affirmed, & stand as the judgement of this court, and that the respondent recover of the appellant one hundred and forty-six $\frac{17}{100}$ dollars, costs of appeal.

$147,17

JOHN J. WHITE, *Clk.*

(Indorsement on cover:) No. 302. The Phœnix Insurance Company, plaintiff in error, vs. Thomas A. Gardiner, county treasurer of Kings County. Remittitur. New York sup. c't.

Filed 4 December, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 107.

THE PHŒNIX INSURANCE COMPANY,

Plaintiff in Error,

vs.

THOMAS A. GARDINER, COUNTY TREASURER OF KINGS COUNTY,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

SUPREME COURT OF THE UNITED STATES.

THE PHŒNIX INSURANCE COMPANY,

Plaintiff in Error,

vs.

THOMAS A. GARDINER, COUNTY TREASURER OF KINGS COUNTY,

Defendant in Error.

POINTS FOR PLAINTIFF IN ERROR.

Statement of Case.

This writ of error is brought to review a final judgment rendered in the Court of Appeals, the record of which has been remitted to the Supreme Court of the State of New York. The proceeding was by mandamus in which the plaintiff in error was the relator, and the defendant in error defendant below. To the return to the alternative writ, there was a demurrer and joinder, and the judgment thereon rendered for the defendant against the relator is the same which was, as above stated, affirmed, and is now sought to be reviewed.

The Legislature of the State of New York, in 1863, enacted as follows:

"Chapter 240.

"AN ACT in relation to the taxation of Moneyed Corporations "and Associations.

"*Passed April* 29, 1863; *three-fifths being present.*

"The People of the State of New York, represented in Senate "and Assembly, do enact as follows:

"Section 1. All banks, banking associations and other moneyed "corporations and associations shall be liable to taxation on a "valuation equal to the amount of their capital stock paid in or "secured to be paid in, and their surplus earnings, (less ten per

"cent. of such surplus,) in the manner now provided by law, de-
"ducting the value of the real estate held by any such corporation
"or association, and taxable as real estate.

"§ 2. This act shall take effect immediately."

Under this law authority was claimed to include in that valuation the investments made by those companies in the public indebtedness of the United States, and thus to tax them like other taxable property.

Incorporated companies, perhaps twenty to thirty in all, being of opinion that national stocks owned by them enjoyed under the Constitution immunity from State taxation, instituted suits by certiorari to restrain such taxation, thereby calling in question all authority by virtue of that law to enforce such tax, and asserting immunity of such investments under the Constitution and Laws of the United States therefrom.

The State Courts, however, held the authority valid and denied the alleged immunity, and final judgments to that effect were affirmed by the Court of Appeals, but reversed by this Court. Bank Tax cases, 2 Wallace, 200.

Meanwhile, however, the taxes for the years 1863 and 1864 had been collected, and restitution became a legal duty directly consequent on the illegal collection.

This duty the Legislature honorably and promptly took measures to perform by two acts, in 1866, the one being chapter 864, vol. 2, Laws of 1866, p. 1996, applicable to the city and county of New York, and which was brought to the attention of this Court. The Banks *v.* Mayor, &c., 7 Wallace, 16; the other applicable to the County of Kings, which was as follows:

"CHAPTER 418.

"An Act to authorize the Board of Supervisors of the County
"of Kings to correct illegal assessments for Town, County and
"State Taxes.

"*Passed April* 6, 1866, *three-fifths being present.*

"The People of the State of New York, represented in Senate
"and Assembly, do enact as follows:

"Section 1. The Board of Supervisors of the County of Kings
"are authorized and directed to levy and collect by tax, in the same
"manner as other county charges, the several sums paid in the
"County of Kings by the several incorporated companies in said
"county in the years eighteen hundred and sixty-three and eighteen
"hundred and sixty-four, for taxes assessed on their investments
"in the public indebtedness of the United States of America, with
"interest thereon, and which taxes have been judicially decided
"to have been illegally imposed and collected.

"§ 2. The County Treasurer of Kings County, shall pay over and
"refund to said corporations the several amounts of taxes, with

"interest thereon, thus illegally imposed and collected as aforesaid, "in the years eighteen hundred and sixty-three and eighteen hun- "dred and sixty-four out of the moneys so to be raised and col- "lected under the provisions of this act.

"§ 3. The County Treasurer shall, on receiving a certified copy "of the passage of this act, issue to the several institutions referred "to certificates of indebtedness, payable on or before February "first, eighteen hundred and sixty-seven, with interest thereon "from the time said taxes were illegally paid.

"§ 4. This act shall take effect immediately."

This illegality consisted in embracing the investments of those companies in the valuation directed by the act first above recited, and in levying and collecting taxes thereon as on other taxable property, and the judicial decision there mentioned is the judgment rendered by the Court in the Bank Tax cases, and afterwards by the Courts of the State of New York in obedience thereto.

The intent of the act was plainly to make full restitution of both principal and interest of all such taxes, not by bonds payable at a future day as under the New York act, but in cash, as soon as the same could be realized in due course of taxation.

Boards of Supervisors, however, do not assemble for taxation until autumn; and Collector's warrants are not ready for delivery before November or December, and the taxes, when they *do* come in, can be paid out again by the County Treasurer only on vouchers or warrants prescribed by law.

The county certificates of indebtedness prescribed by the third section were, therefore, to fill a three-fold office: First, the creditor companies would at once possess, in support of their claims, official certificates from the County Treasury importing absolute verity for principal and interest: Second, the aggregate of those certificates would guide the Board of Supervisors under the first section, as to the amount to be raised: And third, the County Treasurer would, by these certificates, be provided vouchers on which he could safely allow public money to leave his custody.

This much being premised the present case is brief.

The plaintiff in error, an incorporated company, in the county of Kings, paid, as it alleges (Transcript, p. 4, fols. 11–14), the said county on the 8th of December, 1863, the sum of $1,241.57, and on the 22d of November, 1864, the further sum of $9,165 for taxes illegally assessed and imposed and collected on its investments in the public indebtedness of the United States, specifying the names and amounts of stocks, bonds, and other securities held by it. Of the former sum, $472.93, and of the latter, $2,550.90, were for taxes thus illegally assessed and collected on certificates of indebtedness of the United States.

The defendant in error was County Treasurer, and had before the 12th of May, 1866, received a certified copy of the act, and on that day the plaintiff demanded the certificate or certificates mentioned in the third section—with which request the defendant

complied, except as to the said amounts assessed and collected on the certificates of indebtedness. County certificates for these he refused, on the *sole alleged ground that assessments on investments by the plaintiff in error in the public indebtedness of the United States evidenced by certificates of indebtedness were not within the purview of the said act, and that consequently he as such County Treasurer had no authority in law to issue the certificates so demanded and refused.*

In his return to the alterative mandamus, the defendant in error places his refusal on the exact ground above stated, which he repeats almost in *totidem verbis*, but assigns therefor, p. 6, fols. 14, 15, the *reason* that "the taxes on certificate of indebtedness mentioned in the said writ are *not decided* and *have not been judicially* decided to have been *illegally imposed or collected, nor has it been judicially decided* that certificates of indebtedness of the United States of America *are exempt from taxation*, and *that* taxes therein *have* been illegally imposed and collected, and therefore," &c., as stated in the writ above.

This, with the demurrer, joinder, and judgment for defendant, compose the whole case.

POINTS.

I. The Court has jurisdiction.

The case made in the writ clearly and emphatically called in question the validity of the authority of the State of New York to tax the United States certificates of the indectedness owned by the plaintiff in error—whereby those taxes were illegally imposed, assessed and collected, and therefore the plaintiff was entitled to have, and it was the defendant's duty to issue the certificates of county indebtedness demanded. The State Court by denying the peremptory writ and giving absolute judgment for the defendant in effect decided that the authority so questioned was valid and the tax legal, and that the plaintiff in error was consequently not entitled to receive, nor was the defendant bound to issue to it the certificates demanded. The case is not distinguishable from the Bank Tax Cases, 2 Wallace, 200, and

The Banks v. Mayor, 2 Wallace, 16.

The alleged invalidity in all three was the same, and the decision by the State Court is as emphatic in favor of the validity in the present case as in the others.

If the record shows either by express averment or by clear and necessary intendment that the constitutional provision did arise, and that the Court could not have reached the conclusion and

judgment it did reach without applying it to the case in hand, then the jurisdiction of this Court attaches. It need not appear that the State Court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, and that the Court was induced by it to make the judgment it did.

Furman v. Nicholl 8 Wall., 45–56.

In truth, the record in the case now at bar presents no question but whether certificates of indebtedness were or were not illegally taxed in the State of New York in the years 1863 and 4. The affirmative being maintained by the plaintiff in error and denied by the defendant in error, the State Courts having decided in favor of the latter.

II. That certificates of indebtedness issued by the Government of the United States were not taxable, was adjudged by this Court in both of the last cited cases, and the matter is *res adjudicata*.

III. The case made by the plaintiff in error was within the spirit and letter of the act secondly above set forth.

The last clause of the first section, "and which taxes have been judicially decided to have been illegally imposed and collected," is a settlement, not of a condition or proviso, limiting the extent of the earlier provisions, but of the reason why the act was passed and why restitution had become a clear duty. Matter which is ordinarily either wholly omitted or else inserted in the preamble has here crept into the body of the statute, and it has no effect there which it would not have had if it had been inserted in a preamble or omitted altogether. In either case it would have been the duty of the Board of Supervisors to raise by tax the sums paid by the incorporated companies for taxes on their investments in the public indebtedness of the United States, and it would have been the defendants' duty out of the moneys so raised to refund those taxes, and as a voucher for the claim, to issue the certificates mentioned in the third section. Those taxes would have been equally illegal whether there had or had not been any judicial decision on the subject, or whether such decision, having been in fact made, it was mentioned in the preamble, or in the body of the act, or not mentioned at all. In the statute relative to the city of New York, passed at the same session, no judicial decision was referred to. But this Court held the taxes nevertheless illegal.

IV. The return stated no defence to the writ.

(*a*). Even if the Legislature had been mistaken in supposing that such a judicial decision had been made, still the defendant could not interpose the mistake as a bar to the statute. On him, as well as on the Board of Supervisors, the mandate of the law,

whether founded on misinformation or not, was conclusive. If the taxes had not been illegal at all, but lawfully imposed and collected, and if there had been judicial decisions unreversed affirming such lawfulness, his duty would have been the same. Many a tax, lawfully imposed and collected, has been refunded.

(*b*). The return was utterly bad, in that it attempted to put in issue matters of judicial cognizance—to wit: Matters of judicial decision. No question more frequently arises than whether so or so has ever been decided; but it is not often that courts answer that question by the intervention of juries. Is it possible to state matter more exclusively within judicial cognizance than whether it had ever been judicially decided that United States certificates of indebtedness was or was not exempt from taxation?

(*c*). The return itself, by implication, admits that a judicial decision holding such certificates *not* taxable, would have established a rule of guidance in the present case. But what is a rule according to which a case is to be decided but the law of that case? And what is the return but a challenge to the plaintiff in error to produce a single case in point? And what is that but a demurrer to the case made in the writ? A case beyond all peradventure, since The Banks *v.* The Mayor, 7 Wallace, 16, impregnably strong.

(*d*). It is true that a decision is a fact, as much as any other event. So is the enactment of a statute or ratification of a constitution or treaty. But some facts courts are bound to take judicial notice of, others they can only regard on *allegata et probata*. The latter are within the province of juries or of courts acting instead of juries, but the former never. What facts courts are bound of themselves to know, no amount of evidence nor even of admissions can establish the contrary of. Courts take such facts as they really are, and not as they are untruely admitted or sworn to be. Now what the law is in a given case, what decisions bearing upon it have been made, and when and where, being exclusively of judicial cognizance, there is no alternative when the attempt is made, in the formal pleadings, to carry such questions to the jury, but to demur and so keep them before the Court where they belong. By this nothing is lost, for if the matter demurred to be truly stated and constitutes in law a defence to the previous allegations, a demurrer to it operates as a demurrer to those allegations—a bad return being always good enough for a bad writ or pleading—and the party demurring to it, demurs to himself.

People v. Ranson, 2 N. Y., 490.

(*e*). But if those statements of the previous pleading constitute a valid case (as they cannot do if resting on averments which the Court judicially knows to be false) no defence is interposed by averring matters which the Court must know to be untrue. In

Taylor *v.* Barclay, 2 Sim. 213, the great point was whether Great Britain had recognized Central America as an independent State. The affirmative having been averred in the bill, the defendant demurred. The Vice-Chancellor says: "If he (the plaintiff) makes the fact the foundation of his case that this is an independent government recognized by the government of this country, when it is not so, I must judicially take notice of what is the truth of the fact notwithstanding the averment on the record, because nothing is taken to be true except that which is properly pleaded, and I am of opinion that when you plead that which is historically false and which the judges are bound to take notice of as being false, it cannot be said you have properly pleaded because it is averred in plain terms, and that I must take it as if there was no such averment on the record." See also

Thompson v. Powles, 2 Sim., 194.

In another case Lord Elden refused an injunction which it would have been a matter of course to grant but for his judicial knowledge, contrary to the papers before him, that Columbia was not an independent State.

Bire v. Thompson, cited in Taylor v. Barclay *ubi supra.*

See also,

Jones v. Kinder, 1 Tenn. Rep., 297.

The principle would seem to be necessarily universal that matters which judges must judicially notice are not open to averment and evidence as matters of fact. For, if the verdict should agree with the truth judicially known, the trial would be futile, if contrary to such truth, either the verdict or the judicial knowledge must yield; or else the Court would be compelled to give two judgments, one in favor of each side of the issue.

(*f.*) The very matters which the return alleges not to have been decided, had then been decided contrary to its allegations, in the Bank Tax cases, 2 Wallace, 200. It is true that the published opinion makes no mention of certificates of indebtedness *eo nomine*, but then it does not mention any other particular evidence of debt, neither "seven-thirties," "ten-forties," "five-twenties," "bonds of '81," or anything else specifically; general terms alone are employed. To determine what particulars those general terms were intended by the Court to cover, it is necessary to recur to the records and discover the public indebtedness there specified, and which were pronounced exempt from taxation. *Ram on Legal Intendment passim*, but particularly pages 203–6. The reasoning of the Court extends to all public indebtedness, but of course the actual judgment of exemption was confined to the instruments specified in the records. Whatever are thus specified, and by the actual judgment pronounced exempt and fall within the reasoning of the Court, must of course be admitted to have been judicially decided to be exempt. Such as were not so specified might or

might not be afterwards decided to fall within the same doctrine. But there could be no question as to the others. *They at least* must have been so decided *for they were.*

Now among those Bank Tax cases were those by several banks mentioned below, which claimed exemption from taxation in certificates of indebtedness amounting to $5,993,000, and the claim was allowed.

Bank of America	$1,810,000
Chatham Bank	140,000
Importers and Traders'	188,000
Manhattan Company	146,000
Phœnix	421,000
Trademan's	331,000
Merchants' Exchange	131,000
Oriental	230,000
Union	1,114,000
Shoe and Leather	294,000
American Exchange	950,000
Republic	188,080
	$5,943,000

These investments were declared exempt in the same words which exempted anything else therein specified, and were as much "judicially decided" to have been exempt from taxation as anything esle was so decided, just as much so as the various stocks, etc. for which the defendant *did* issue to the plaintiff country certificates. The return is therefore bad in every way.

It is respectfully submitted that this Court would promote substantial justice, if, besides reversing the judgment of the State Courts it should remit the record with directions to grant the writ of peremptory mandamus with costs in the State Courts as well as this Court as in

Furman v. Nicholl, 8 Wall., 44.

ALVIN C. BRADLEY,

E. C. Benedict *Of Counsel for Plaintiff in era.*

SUPREME COURT OF THE UNITED STATES.

No. 107.

THE PHŒNIX INSURANCE COMPANY,

Plaintiff in Error,

vs.

THOMAS A. GARDINER, COUNTY TREASURER OF KINGS COUNTY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

SUPREME COURT OF THE UNITED STATES.

THE PHŒNIX INSURANCE COMPANY,

Plaintiff in Error,

vs.

THOMAS A. GARDINER, COUNTY TREASURER OF KINGS COUNTY,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

POINTS FOR DEFENDANT IN ERROR.

Statement of Case.

The proceeding in the State Court, was a mandamus, to the defendant in error, the County Treasurer of Kings County, State of New York—founded on an act of the Legislature of the State of New York, passed in the year 1866, and found in Vol. 1, Laws of 1866, of the State of New York, page 919, as follows:

Chap. 418.

AN ACT to authorize the Board of Supervisors of the County of Kings, to correct illegal assessments for Town, County and State taxes.

Passed April 6, 1866; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The board of supervisors of the county of Kings, are authorized and directed to levy and collect by tax in the same manner as other county charges, the several sums paid the county of Kings by the several incorporated companies in said county in the years eighteen hundred and sixty-three and eighteen hundred and sixty-four, for taxes assessed on their investments in the public indebtedness of the United States of America, with interest thereon, and which taxes have been judicially decided to have been illegally imposed and collected.

§ 2. The county treasurer of Kings county shall pay over and refund to said corporations the several amounts of taxes

with interest thereon, thus illegally imposed and collected as aforesaid, in the years eighteen hundred and sixty-three and eighteen hundred and sixty four, out of the moneys so to be raised and collected under the provisions of this act.

§ 3. The county treasurer shall, on receiving a certified copy of the passage of this act, issue to the several institutions referred to, certificates of indebtedness payable on or before February first, eighteen hundred and sixty-seven, with interest thereon from the time said taxes were illegally paid.

§ 4. This act shall take effect immediately.

The alternative mandamus issued thereon, commanding the defendant in error as County Treasurer, to issue to the plaintiff in error, "one or more certificates of in-
Case, fol. 14. "debtedness, payable on or before the first day of February "then next, for the taxes illegally imposed, assessed and col-"lected from the said Phœnix Insurance Company on their "investment, in the public indebtedness of the U. S. evidenced "by 'certificates of indebtedness as hereinbefore mentioned, "with interest, &c,'" or show cause, &c.

The defendant in error makes Return and shows cause by his answer,—"that the taxes on certificates of indebtedness "mentioned in said writ, are not decided, and have
fol. 15. "not been judicially decided to have been illegally "imposed or collected, nor has it been judicially de-"cided that 'certificates of indebtedness' of the U. S. are ex-"empt from taxation, and that taxes thereon have been illegally enforced and collected; and therefore, that the investments of the relator in "certificates of indebtedness" stated "in said mandamus are not within the purview of the act "chap. 418 of the laws of 1866—"
and therefore that defendant had, and has no authority in law, to issue the certificates.

fol. 15. Demurrer by plaintiff to the return.

fol. 16. Joinder in Demurrer.

The Justice of the Supreme Court of the State of New York—before whom the Demurrer was argued—ordered judgment thereon for the defendant.

In his opinion—he holds the Return was not sufficient—and the demurrer well taken—but that the
fol. 18. statement of facts, made by plaintiff, in the writ of mandamus, was not sufficient—and therefore the Defendant was entitled to judgment.

Appeal was taken by plaintiff to the General Term of the Supreme Court—before Justices Lott, Barnard & Scrugham—and there the judgment affirmed, on the 15th February, 1867.

fol. 23. "Opinion by Justice Barnard."

No opinion of Justice Barnard appears in the case.

In the printed case an affidavit of the plaintiff's at-
fol. 26. torney, March, 1867, states "that he this morning received from Mr. Justice Barnard a letter undated, but postmarked yesterday, stating that the preparation of the Opinion in this case had been delayed by the express company having miscarried his papers: and concluding as follows: "I will prepare the opinion as soon as I can get time, and send you a copy. J. F. Barnard."

At page 613, vol. 48, Barbour's Reports of the Supreme Court of the State of New York, in the Report of this case, after giving the opinion of Judge Gilbert at Special Term—as printed in the case—is the following entry:

"J. F. Barnard, J., was for affirmance, on the ground that "the return presented a question of fact, and the demurrer "admitted the truth of it."

On the 29th July, 1870, in answer to a letter of defendant's attorney, JUDGE BARNARD says: "I know that my decision was based upon the construction of return and demurrer, in some way, and not upon the taxability of the certificates. I thought them taxable, and from the memorandum, the General Term agreed with me by assigning me to write opinion."

No opinion of the Court of Appeals appears in the case.

POINTS

FOR DEFENDANT IN ERROR.

1. There does not appear on the Record—
   1. "That some one of the questions stated in the 25th section of the Judiciary act of 1789 did *arise* in the Court below,
      "and"
   2. That a decision was actually made thereon by the same Court, in the manner required by the section.

"If both of these do not appear on the Record, the appellate jurisdiction fails."

1 Kent's Commentareis, page 327 (note *c*, 11th ed.)
Craig vs. State of Missouri. 4 Peters, U. S. 410
Crowell vs. Randell, 10 Peters, U. S. 368, 12 Peters U. S. 507 S. P.
Ocean Ins. Co. vs. Polleys, 13 Peters, U. S. 157 S.P.
Coons vs. Gallagher, 15 Peters, U. S. 18, S.P.
Conkling's Treatise, (4th ed.) page 34.
Armstrong vs. The Treasurer of Athens County, 16 Peters, U. S. 281.

Specifying cases of appeal giving jurisdiction.

"It must be entered on the record of the proceedings in

"the Appellate Court, in cases where the record shows that "such a point may have arisen and been decided; that it was "in fact raised and decided.

"And this entry must appear to have been made by order "of the Court, and certified by the Clerk, as a part of the "record in the State Court."

See to the like effect:

Commercial Bank of Cincinnati vs. Buckingham Executors, 5 Howard 317.
Grand Gulf R. R. Co. vs. Marshall, 12 Howard 165, 20 Howard 26.

"Where it appears from the record that the decision of the State Court turned upon the *construction* of the State Law, and that the question of its validity was not raised; the Court has no jurisdiction."

12 Howard, 165, and cases cited in Conkling's Practice, 4th ed., p. 34.

Nothing outside the record can be taken into consideration.

6 Wall 124, 8 Wall 314,
8 Wall 44, 9 Wall 611.

II. It does appear affirmatively, that the decision of the Supreme Court of the State of New York was not made against the right set up by the party under the statute of the United States.

See 48 Barbour N. Y. Reports, page 608, (Judge Barnard's statement).

The decision of the Supreme Court was made on a question of pleading, and the affirmance by the Court of Appeals, must be presumed to have been made on the same ground.

16 Peters, U. S. Rep. 281.

Where a party claims below wholly in virtue of the laws of a State; and the highest court of the State decides that under these laws the claimant has no case, no writ of error lies.

9 Wallace 611.

Where a State law is valid—and the only question is whether it has been correctly construed—the Supreme Court has no jurisdiction.

5 Howard, 317. 2 Black, 574.

III. The case presents a mere question of pleading based upon the construction of the State statute, and the Supreme Court of the United States has no jurisdiction of the writ of error.

The proceeding in the State Court was founded merely upon the statute of the State, and not upon the taxability of the certificates.

No right of action existed against the defendant in error, except upon the statute of the State.

The statute of the State is the whole ground of action and liability of the defendant.

Error does not lie to a State Court on a mere question of pleading and evidence.

White vs. Wright, 22 Howard 19.

IV. The decision of the State Court was correct. The Return to the mandamus presented an issue of fact—which is admitted by the Demurrer—and which is a good answer to the proceeding.

The mandamus avers that—

"Whereas, it has been judicially decided that all taxes assessed, imposed, and collected on investments in the public indebtedness of the U. S. were illegal," &c.

The Return says—

"That the taxes on certificates of indebtedness mentioned "in said writ of alternative mandamus are not decided, and "have not been judicially decided to have been illegally im- "posed or collected, nor has it been judicially decided that "'certificates of indebtedness' of the U. S. of A. are exempt "from taxation, and that taxes thereon have been illegally "imposed and collected."

The point set up in the Return was not the question of law; whether "certificates of indebtedness" were taxable, but the fact that no decision had been made; judicially deciding that, they were exempt from taxation. The law is contained in the statute.

The decision of the Court, judicially determining their exemption, is a fact, and a fact which is the only evidence of the judicial declaration of the law.

Whether a decision has been made, is a mere question of fact.

The effect of the decision when enunciated is a question of law.

What the Court decides, is a question of law, whether a decision has been made, is a fact.

The duties of the County Treasurer under the State law were separate from those of the Supervisors, whose duty was to collect the money by tax and pay it to the Treasurer.

The Treasurer was to act in anticipation of the collection of taxes, by giving certificates of indebtedness to the parties to whom the monies to be raised by tax were payable, when collected.

PHILIP S. CROOKE,

Of Counsel for Defendant in Error.